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IN THE

Supreme Court of the United States

October Term, 1950

No. 253

ARGONNE COMPANY, INC., A Corporation, *Petitioner,*

v.

LUCIA HITAFFER, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF IN OPPOSITION.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 13-24) is not yet reported.

COUNTER STATEMENT OF THE CASE.

On December 11, 1948, Respondent (one of two plaintiffs below) filed a Complaint asking damages against Argonne Company, Inc., Petitioner, on the grounds that by reason of the negligence of petitioner in failing to provide proper protection for her husband while an employee of petitioner he suffered and sustained severe injuries which resulted in the loss of consortium to her (R. 2, 3 and 4).

On February 24, 1949, the United States District Court for the District of Columbia granted summary judgment in favor of defendant (petitioner here) (R. 9).

An appeal was duly taken (R. 10) and the United States Court of Appeals for the District of Columbia Circuit reversed the lower court and remanded the matter for further proceedings (R. 25).

The two propositions presented on appeal were:

(1) Plaintiff has a common law right to a cause of action for negligent injury to consortium. See: Appellant's (Respondent) brief (page 15), certified copies of which are filed with this record.

Petitioner conceded this legal position. See: Appellees' (Petitioner) brief (page 15), certified copies of which are filed with this record.

(2) The injury complained of was not compensable under the Longshoremen's and Harbor Workers' Compensation Act, since it is an injury to an independent property right of one not covered by the Act, and, therefore, the Act did not exclude plaintiff from maintaining a cause of action. See: Appellant's brief (page 7).

SPECIFICATION OF ERRORS.

Petitioner's specification of errors (2) attempts to expand the Court's opinion in an effort to find conflict. The decision holds only that where a third person is suing in her own right on account of a breach of some independent duty owed her, the Act does not proscribe her cause of action

simply because the operative facts out of which the independent right and correlative duty arose are the same as those out of which the injured employee recovered compensation. This is quite different from petitioner's specification of errors which gleans from the decision the proposition that no independent right of a third person is barred and that only the injured employee or anyone suing in his right is denied redress other than through the Act.

SUMMARY OF ARGUMENT.

The wife of an injured employee may maintain an independent cause of action for loss of consortium even though her husband has received compensation for the injuries to himself which resulted in the loss under the Longshoremen's and Harbor Workers' Compensation Act.

ARGUMENT.

The United States Court of Appeals for the District of Columbia Circuit found by its decision that the wife of an injured employee could bring an independent cause of action in her own right against the employer where the negligent injury resulted in loss of consortium to her, even though the injured employee himself had received compensation.

In reaching this decision, it having been previously conceded by petitioner that the wife of an injured employee, as in the instant case, has a common law cause of action, the Court simply held that the Longshoremen's and Harbor Workers' Compensation Act did not provide compensation for the loss which the wife suffered nor did it relieve the negligent employer from his common law duty to her.

Under the Act the liability of an employer, prescribed in Section 904, is made exclusive and in place of all other liability to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer on

account of such injury. This obviously prohibits recovery to any of the above classes bringing an action based upon the employee's rights. Therefore, the remedies provided under the Act are exclusive for the injured employe or one in his stead where compensation is provided. This, however, is not the instant case. *The cause herein is predicated upon the breach of an independent duty to a third party who brings the action in her own right.*

The opinion of the United States Court of Appeals for the District of Columbia Circuit in the instant case, holding that Section 905 of the Longshoremen's and Harbor Workers' Compensation Act does not deny to a wife a cause of action for negligent injury to her husband which results in loss of consortium to her, finds its rationale in recognizing that consortium is a separate and independent right and that an injury to that right constitutes a tort upon the wife and for which she can predicate an independent cause of action. The action for loss of consortium obviously does not stand on subrogation but arises from the tort itself and, consequently, is without the scope of Section 905 of the Act.

The question here involved is simply the right of a third party to bring an *independent cause of action* for an *independent injury* to an *independent property right* where the operative facts out of which this independent right and correlative duty arose are the same as those for which the injured employee, her husband, received compensation under the Act.

The record contains no question of general importance, or a question of substance relating to the construction or application of the Constitution, or a Treaty, or Statute of the United States which has not been or should be settled by this Court.

The decision is in conformity with all decisions of the United States Court of Appeals for the District of Columbia Circuit and a reversal of this case would necessitate a serious breach in the structure supporting many of the re-

lated decisions and an annihilation of the philosophy upon which all compensation legislation has been predicated.

There Is No Conflict with the Decision of This Honorable Court.

Petitioner asserts that a Writ of Certiorari should be granted because the United States Court of Appeals for the District of Columbia Circuit has rendered a decision which is in conflict with this Honorable Court and with the courts in the Second and Ninth Circuits.

Even a brief analysis of the cases* which petitioner cites as authority for this position is sufficient to clearly show that not only is there no conflict between those decisions and this case but that there is not even a similarity with the factual situation presented here. In the instant case a wife has brought an action against an employer for a negligent injury to her husband which resulted in loss of consortium to her; whereas, in the three cases cited by petitioner, purporting to show conflict with this Honorable Court, the employee sued for injuries to himself, which he had sustained while in the course of his employment.

In the *Swanson* case, supra, an action was brought by Swanson, a longshoreman, against Marra Bros., under the *Jones Act*, to recover for injuries sustained while plaintiff was struck with a life raft which fell from a vessel while plaintiff was working on a pier. The Court succinctly states the legal problem on page 2:

> "The question for decision, which was reserved in O'Donnell vs. Great Lakes Dredge & Dock Co., 318 US 36, 43, 44; 63 S. Ct. 488, 492; 87 L. Ed. 596, is whether petitioner may maintain a suit against his employer to recover under the *Jones Act*."

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* Swanson v. Marra, 328 U. S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946); Nogueira v. N. Y., N. H. & H. R. Co., 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754 (1930); Norton v. Warner Co., 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931 (1944).

In *Nogueira* v. *N. Y.*, supra, action was brought under the *Federal Employers Liability Act* by a railroad freight handler who was injured on a vessel used in transporting railroad cars. The Court quite properly found that his remedy was under the Longshoremen's and Harbor Workers' Compensation Act since a car afloat in navigable waters is subject to the Maritime Law like any other vessel.

In the *Norton* v. *Warner Company* case, supra, action was brought by Warner against the compensation commissioner to have set aside an award of compensation under the Longshoremen's and Harbor Workers' Compensation Act in favor of an injured bargeman. The Court set out the problem, page 566:

> "The question in this case is whether Nicholas Rusin, a bargeman employed by respondent, is entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 USC, Sec. 901 et seq, 33 USCA, Sec. 901 et seq, for injuries received when a capstan bar which he was using to shift the barge at a pier, pulled out and struck him upon the chest and caused him to fall."

A careful investigation of these cases further reveals that they contain no law nor even dicta which should induce this Honorable Court to re-examine this case in light of these decisions, on the basis of an alleged conflict.

There Is No Conflict with the Decisions in Other Circuits.

The three cases* in the Second and Ninth Circuits upon which there is claimed to be conflict are no more similar than the Supreme Court cases above; nor does the law found therein present any difficulty when considering the rationale of the decision in the instant case.

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* Lynch v. United States, 163 Fed. 2d 97; American Mutual Liability Insurance Company v. Matthews et al., 182 F. (2d) 322; United States v. Arrow Stevedoring Company (June 21, 1949), 175 F. (2d) 329.

In the *Lynch* case, supra, there was an action for *death* brought by a widow against her husband's employer. The Court said, in part, page 92:

> "Her only relief against it (Bethlehem) lies under the *provisions* of the Longshoremen's and Harbor Workers' Compensation Act." (Emphasis added)

The action of the widow is a derivative one flowing from the death of her husband and for her loss a specific provision in the form of a specified amount of compensation is provided by the Act. This is completely different from the instant case where there is a separate injury to a wife's individual property right, consortium, for which no compensation or relief of any sort is provided by the Act.

In *American Mutual Liability Insurance Company* v. *Matthews,* supra, an action was brought for contribution by an insurance company on behalf of the ship owners against a firm of stevedores to recover one-half of the judgment previously recovered by the injured employee from the ship owners for injuries caused by a faulty line furnished by the ship owners. The Court in denying the right to contribution held that the parties were not joint tort feasors since there was no common liability. The injured employee's claim against the employer would not have been for damages; his relief would have been under the compensation laws. His claim, however, against the ship owner would have to be predicated upon damages sustained. The Court found that there existed no contractual basis for contribution because it found no promise on the part of the employer to protect the ship owner against a liability growing out of the ship owner's own negligence.

In the instant case there is the previously conceded common law duty upon the employer to *not* interfere with the independent right of a wife to consortium. Respondent's action is based upon a negligent injury to this separate property right.

In the *Arrow* case, supra, the Arrow Stevedoring Company, which was impleaded in a proceeding brought by an injured employee against the government, was liable under a contract of indemnity to the government where the latter responded in damages to the injured employee who sustained injuries while in the course of his employment.

Certain it is that petitioner has exhibited no conflict with the above cases and, indeed, when considering similar cases to those relied upon, points out on page 8 of its petition, "These cases are entirely different types of cases from the instant one, and from the facts therein should have no application whatsoever in resolving the issue in this cause."

The United States Court of Appeals for the District of Columbia Circuit Has Given Proper Effect to All Applicable Decisions of This Court.

Petitioner next urges certiorari on the grounds that the United States Court of Appeals for the District of Columbia Circuit "has not given proper effect to applicable decisions of this Honorable Court." Here again petitioner relies solely upon the same three cases* which it cited as authority for stating the existence of a conflict between the instant case and these three decisions of this Honorable Court.

As was indicated before, in two of the three cases the action was brought by the injured employee *himself*; in one case, under the *Jones Act*; in the other case, under the *Federal Employers Liability Act*. The third case was brought by the employer against the Compensation Commissioner. As would be expected, the decisions held that the injured employee's rights are determined by the provisions of the Compensation Act. With these factual differences, how

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* Swanson v. Marra, 328 U. S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946); Nogueira v. N. Y., N. H. & H. R. Co., 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754 (1930); Norton v. Warner Co., 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931 (1944).

can it be seriously urged that the law in these cases has not been given proper consideration? In the instant case the Court simply recognizes the right of the wife of an injured employee to bring a cause of action for damages to her own, separate and independent property right.

The Interpretation Given to Section 905 of the Longshoremen's and Harbor Workers' Compensation Act Is in Harmony with the Leading Related Cases in All Jurisdictions.

Petitioner's third and concluding argument directs itself to the importance of Section 905 of the Act and states that this decision is "unique and stands opposed to an (sic) unanimity of decisions of courts in many other jurisdictions * * *"

It is respectfully submitted that petitioner's conflict is imagined, is not real, and arises only because petitioner refuses to recognize the distinction, on one hand, between a cause of action brought by an injured party growing out of a violation of a duty to an independent property right of that party, i.e., an action for consortium by a wife, and, on the other hand, a derivative cause of action brought by a third party who suffered no direct loss, i.e., a personal representative's action for wrongful death.

This obvious distinction has been recognized generally by all courts who have had an occasion to consider independent causes for independent wrongs where an employee covered by compensation brought an act against a third party. Courts have been uniform in holding that the exclusiveness of liability, which petitioner herein contends should constitute immunity, did not deprive a third party from bringing a cause of action against an employer where the injured employee had recovered for his injury from the third party.

In *The Tampico* (D.C. N.Y., 1942), 45 Fed. Sup. 174, an injured employee after receiving compensation from his employer recovered further for his injury from a third

party who then impleaded the employer for contribution. The Court held that the immunity extended to suits brought by the injured employee or *anyone in his right,* but furnished no defense to an action for contribution which arises from the tort and does not stand on subrogation.

The *Tampico* case clearly illustrates that respondent's position of absolute exemption from all liability to *all* parties for *any* damage growing out of injury to an employee would, as in the instant case, lead to absurd and illogical consequences. The United States Court of Appeals for the District of Columbia Circuit simply cites the case to show that an employer, although immune by Section 905 of the Act from suits for damages resulting from injuries to an employe covered by compensation, is not so protected when the injury is to the property right of a third party who is not provided for.

The instant case is one step more remote on the ladder of immunity since obviously all protective legislation must draw the line somewhere; there are those persons and injuries covered by the Act, others not, as in the instant case. Compensation for the injury herein complained of could not even remotely be conceived. Petitioner would make the injury, "damnum absque injuria."

And in *Rich* v. *U. S.* (C.C.A. 2, 1949), 177 Fed. 2d 688, the Court held that a third party, the United States, could implead the employer even though the injured employee had received compensation before bringing the action against the third party. The Court said, in part, page 691:

> "* * * (T)he third party does not sue the employer for damages 'on account of' the injury to or death of the employee but for breach of an *independent duty* owing to the third party by the employer." (Emphasis added.)

A few of the many other cases following this reasoning are: *Burris* v. *American Chicle Company* (C.C.A. N.Y.), 120 Fed. 2d 218; *The Samovar* (D.C. Cal.), 72 Fed. Supp.

574; *Rappa* v. *Pittston Stevedoring Corp.* (D.C. N.Y.), 48 Fed. Supp. 911; *Green* v. *War Shipping Administration* (D.C. N.Y.), 66 Fed. Supp. 393; *Severn* v. *U. S.* (D.C. N.Y.), 69 Fed. Supp. 21; *Portel* v. *U. S.* (D.C. N.Y.), 85 Fed. Supp. 458.

CONCLUSION.

It seems perfectly clear that the Act does not cut off independent rights of third parties and deny to them redress for violation to those independent rights when the Act does not even purport to provide compensation for them of any sort. The essence of the Act is to provide compensation to injured employees or other persons such as a widow or personal representative suing in the employee's right on account of disability or death. In these instances it prescribes the remedy and is exclusive.

The injury to consortium is an injury to an independent right vested in a spouse and to which right petitioner owed an independent duty, the violation of which has properly been held actionable by the United States Court of Appeals for the District of Columbia Circuit.

For this reason and those hereinbefore stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

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